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ABSTRACT

Decisions made by federal and state courts during 1983 concerning the liability of schools, school districts, school boards, or school employees in tort cases are reported in this chapter. Torts are civil causes of action based on noncontractual legal responsibilities that individuals have to avoid harming or injuring another's person, property, or reputation. Cases involving claims of negligence, the most common tort, involved injuries to students at school and en route to or from school, as well as injuries to nonstudents. Other negligence cases reported were affected by the application of various defenses against negligence claims, including two types of immunity and the concepts of contributory and comparative negligence. Other topics addressed include tort claims in the areas of liability insurance, injuries to employees, workers' compensation, assault and battery, defamation, interference with contracts, products liability, invasion of the right to privacy, and liability for denial of constitutional rights. (PGD)

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TORTS

Paul W. Thurston

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5.0 INTRODUCTION

Torts is a general term used to define several independent civil causes of action based on noncontractual legal responsibilities that individuals have to avoid harming or injuring another's person, property, or

reputation. The word "tort," derived from the Latin word "tortus" meaning "twisted," was at one time common in English as a general synonym for "wrong."[1] The general sense of tort as wrong suggests the difficulty involved in providing a precise definition. According to Proser, torts is "a body of law which is directed toward the compensation of individuals rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required."[2]

Torts are actually separate, independent causes of action that define a particular level of conduct that the law recognizes individuals owe one another. The more common torts have developed historically and have been recognized for centuries. Examples of these range from negligence to assault and battery to libel and slander. But tort law is not static. As society changes, it is possible for courts to define new legal responsibilities between individuals. Constitutional torts is, for example, a particularly active area of litigation now.

This chapter will report on those cases that have been reported during 1983 that involve some type of tort claim within the school context. The cases are organized according to the particular type of tort involved. The categorization system employed will follow basically the format used in recent volumes of *The Yearbook of School Law*.

5.1 NEGLIGENCE

Negligence is the most common tort. In the lay person's mind negligence describes a type of conduct. But in a legal sense, for an injured party to secure monetary damages from another party for allegedly negligent action, the injured party will need to plead and prove, at minimum,[3] four elements.[4] Schools and their employees are not responsible as insurers for any and all injuries that occur. For liability to be present it must be shown that the school owes a particular duty to the injured person(s), that the bahavior fell short of that required, that this breach was the proximate cause of the injury, that there were real injuries, and that the plaintiff was not responsible for causing the injury. Let us briefly consider the first four elements that make up the prima facie case:

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1. W. PROSSER, HANDBOOK ON THE LAW OF TORTS (4th ed. 1971).
2. *Id.* at 6.
3. The exact elements necessary for carrying the plaintiff's burden in the prima facie case will vary from state to state. Some states, for example, will require the plaintiff to plead an absence of contributory negligence while other states do not.
4. *See* PROSSER, *supra* note 1 for a more detailed description of elements of the prima facie case.

1. *Duty of Due Care.* There is a duty of due care that the law recognizes one person owes to another. It requires a certain standard of conduct for the protection of others against unreasonable risks. One has a legal duty to act as an ordinary, prudent, reasonable person in the circumstances. A child is expected to conform to the standard of care of a child of like age, education, intelligence, and experience.

The duty can be specified by statute or as a matter of common law. Usually in the school context, it is not hard to show that the school (and its teachers) have a duty to protect the health and safety of the students while they are in the custody of the school.

2. *A Breach of the Duty.* This amounts to a failure of one party to conform to the standard required toward another. This can occur either from an action or an omission. The breach of the duty of due care in a specific case is a question of fact. Making a showing of this breach involves both a showing of what actually happened and showing from these facts how the defendant acted unreasonably. Alleging failure to supervise, for example, is alleging that the teacher omitted or failed to take the appropriate action.

3. *Causation.* There needs to be reasonably close causal connection between the alleged misconduct and the resulting injury. This involves both a cause-in-fact relationship between the behavior and injury as well as the behavior and injury being sufficiently close in time and foreseeability.

4. *Actual Damages.* The plaintiff must show an actual loss or real damages. Nominal damages, to indicate a technical right, or the threat of future harm, not yet realized, are insufficient injury on which to bring a negligence action. The amount of damages awarded depend upon the particular circumstances of the person injured and what amout of money it will take to make that person whole.

There are two other components of the prima facie case that are basic to understanding its operation: foreseeability and the reasonable person standard. Foreseeability, which is either subsumed under the duty of due care element or the proximate cause element, means that the defendant could or should have seen the potentially dangerous consequences of the action when it was taken. This does not mean that the defendant subjectively or personally actually foresaw the potential danger. Rather, the defendant is presumed to be a reasonable person and the jury then is given instructions like the following to determine foreseeability: "Would you, as a reasonable person, standing in the place of Y defendant at X time, have foreseen the occurrence of Z injury?" Notice that under this instruction the jury enjoys the luxury of hindsight when determining foreseeability, something that often leads to sharper vision than the defendant actually may have had.

The application of these legal standards depends on the particular set of facts involved. The jury usually plays the central role as fact finder for all the elements of the prima facie case. Still, the judge controls, as a matter of law, which cases involve factual allegations sufficient to go to the jury. All the cases in this chapter involve questions of law. Presumably a much greater number of cases involving school negligence that are heard at the trial court level are decided by the jury and not appealed. These cases are not reported in any systematic way and are not reported in this chapter.

Torts, generally, and negligence, more so than other torts, are strictly a matter of state law. And, it is important to note at the outset, there is considerable variation between states in many areas of negligence law, particularly in the appropriate standard to be used for liability and the existence of immunity, to mention just two. This variation suggests that readers need to be cautious in applying a case decided in one state to another state. Extreme caution is appropriate when thinking about the precedential value of one case to another state. It is, of course, possible for a case to have precedent to another state if the same mode of analysis is applied. Determination of the existence of a duty of due care in a particular situation will often have transferability from one state to another, for example. But because of the diversity between states, both as to their statutes and earlier judicial decisions, caution is advised. It is quite possible, for example, to take the same fact situation and get quite different results in two different states because of different standards being applied.

5.1a Student Injuries

Schools have a duty to protect the health and safety of students while they are in their charge. Consequently, when students are injured it is common to inquire whether the injury is due to a breach of this duty by a school employee. There is also a strong financial incentive to bring an action against a teacher or a school district because of the availability of money to pay the damages. Since the circumstances will determine the liability and because the circumstances vary widely, it is instructive to look at the following cases reported in the past year that involved student injuries. The cases are organized in general categories according to the location where the injury occurred.

5.1a(1) School Settings During School Hours

Several of the cases reported last year in this area are instructive about the significance of finding a breach of a duty of due care. It is not

enough to simply have a student suffer an injury, but the injury must result from an action or inaction of someone else by whom the action or inaction should have occurred.

For example, in a Pennsylvania case, a fifth-grade student, returning to the classroom from recess, was struck in the eye by a pencil that had been propelled from the hand of a classmate. The teacher was outside the classroom monitoring the return of the students from recess when the injury occurred. The student who dropped or threw the pencil and two other students had been required to remain in the classroom during recess as punishment for misbehavior at breakfast. The students were told to take their seats when the teacher stepped outside to supervise the return from recess. The trial court found the teacher negligent and awarded $15,000 to the injured party. The appellate court reversed,[5] holding that the momentary absence of the teacher was authorized for purposes of monitoring the return of thirty students from recess. This momentary absence from the classroom was not negligence, and therefore there was no libility for the student injury that occurred.

A sixth-grader was struck in the eye by a pencil that slipped from the hands of two classmates who were scuffling over it. This incident occurred at a time when the students had just returned. The district and the absent teacher were sued for the loss of vision in the eye because of the teacher's alleged negligence in not being present at all times to supervise the students. In weighing this claim the court had to articulate a standard for the teacher's duty of due care.[6]

> [W]e are persuaded that foreseeability of harm to pupils in the class or at the school is the test of the extent of the teacher's duty to safeguard her pupils from dangerous acts of fellow pupils, and absent circumstances under which harm to her pupils might have been reasonably foreseen during her absence, that [the teacher] was not under a duty to either remain with her class at all times or to provide other adult supervision at all times while she was absent.[7]

Based on this, and insufficiently serious incidents to put the teacher on notice about safety concerns in the classroom, the North Carolina Court of Appeals affirmed the lower court's directed verdict dismissing the claim against the teacher and the district.

During playground recess one kindergarten student threw a stick, injuring the eye of a classmate. The injured student brought an action

5. Simonetti v. School Dist. of Philadelphia, 454 A.2d 1038 (Pa. Super. Ct. 1982).
6. James v. Charlotte-Mecklenburg Bd. of Educ., 300 S.E.2d 21 (N.C. Ct. App. 1983).
7. *Id.* at 24.

against the district for inadequate supervision. The District of Columbia Court of Appeals dismissed the action, holding that the level of teaching supervision on the playground satisfied the supervision standard and that there was no showing that there was a breach of duty by the district.[8] The school district is not strictly liable for all injuries that may occur to the children. Here there is no demonstrated breach of duty by the district. But, even assuming that it could be shown that there was a breach of duty, the district is not liable, because there was no showing that a violation of the reasonable standard of care was the proximate cause of the injury. Rather the injury was the consequence of an unforeseeable, intervening act of a third party that could not be anticipated or prevented.

A twelve-year-old boy who was playing ball in the school yard during noon recess was struck in the mouth by a rock thrown by another child. At the time of the incident there were about 170 students playing in the yard with three school teachers on duty to supervise the children. A negligence action was filed on the basis that an unpaved area of the playground constituted an unreasonably hazardous condition. The appellate court affirmed the trial court in dismissing the action on the basis that there was insufficient evidence to support the claim that an unreasonably hazardous condition existed. In addition, the supervision was adequate for the playground and number of students using it.[9]

A student was injured in physical education class while vaulting over vaulting horse in which pommels on horse had been removed. The Minnesota Supreme Court held the jury could find negligence if it were persuaded by the evidence that the prevailing custom of using vaulting horses with exposed holes fell below requirements of reasonable care.[10] It also held there was insufficient evidence of negligence on part of manufacturer shown.

A kindergarten student, injured when a deep-fat fryer being used to deep-fat fry donuts in the shape of the letter D was tipped over, brought a negligence action against the school district, the principal, and the teacher. The Oklahoma Supreme Court reversed the appellate court and reinstated the trial court decision in which the principal was dismissed from the action and the jury found for the teacher and the school district.[11] The Supreme Court reinstated the trial court decision because the exposure of the students to the plugged-in deep-fat fryer could not be treated as either negligence per se or as an ultrahazardous

8. District of Columia v. Cassidy, 465 A.2d 395 (D.C. 1983).
9. Hampton v. Orleans Parish School Bd., 422 So. 2d 202 (La. Ct. App. 1982).
10. Tiemann v. Independent School Dist. No. 740, 331 N.W.2d 250 (Minn. 1983).
11. Wetsel v. Independent School Dist. I-1, 670 P.2d 986 (Okla. 1983).

activity. Rather, since there was no undisputed proof of negligence, liability should appropriately be decided by the jury. Therefore, the jury verdict was reinstated.

A high school senior filed a negligence action against the high school coach for not filing timely letters of reference for possible receipt of a basketball scholarship from a university. The appellate division affirmed dismissal of the case because there was no duty owed by the coach to the student.[12] There was certainly no rule or regulation that could be alleged on the basis of such a duty, and the court refused to recognize that such a duty had arisen through custom.

A teacher's duty to conduct classes so as not to expose students to unreasonable risk of injury was not breached when a student tripped and fell while carrying heavy metal at a vocational-technical school, since the twenty-nine-year-old student, who had been taught to use cutting torch and instructed to cut metal into three pieces before moving it, should have been able to carry out instructions without need of supervision. The student's negligence was the sole cause of the accident because he failed to follow instructions. Judgment was awarded to the school district.[13]

A school district had a summer youth program, and two fifteen-year-old students assigned to assist the custodial staff took some magnesium powder and potassium nitrate from glass jars and put it into bushes below where they intended to retrieve it after work. That day an eight-year-old who lived near and often played at the school discovered the bags and began playing with the chemicals and matches he had found earlier. The boy suffered second-degree burns when the chemicals exploded. The New York Court of Appeals affirmed the trial court decision holding the district liable in negligence for the injury.[14] The school district had a duty to maintain its property in a safe condition. Injury to someone playing on the school grounds was foreseeable. The district did not take reasonable care in appropriately securing the chemicals in such a way that unsupervised access could not be obtained. The central claim of the district was that the fifteen-year-old students had stolen the chemicals outside of the scope of their employment, and that this broke the causal chain between the duty of the school and the injury. Yet, the court rejected this because it finds that this type of intervening act was a natural and foreseeable consequence of the circumstances created by the school district. Since this theft was reasonably foreseeable and not adequately protected, the school district maintains liability for the injury.

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12. Hunt v. Scotia-Glenville Cent. School Dist., 460 N.Y.S.2d 205 (N.Y. App. Div. 1983).
13. Lemelle v. Louisiana, 435 So. 2d 1162 (La. Ct. App. 1983).
14. Kush v. City of Buffalo, 462 N.Y.S.2d 831 (N.Y. 1983).

A fourteen-year-old dislocated an elbow upon running into the wall while running the speed test of the New York physical fitness test in a gym class. Because of specific warnings about safety consideration and because the State Physical Fitness Screening Test Manual specified fourteen feet of clearance space beyond the finish line, where the school provided only eight, a New York Supreme Court, Appellate Division held that there was sufficient proof from which a jury could conclude that the instructor was negligent with respect to both the design of the course and the failure to give proper instructions.[15] A new trial was granted.

A third-grade girl suffered an intraoccular hemorrhage when she was struck in the eye by an apple thrown by a student. The Louisiana Court of Appeal affirmed the trial court decision that there was negligence on the part of the school for providing inadequate supervision in the bathroom area of the school. It also affirmed the award of $3,000 in general damages and $970 in special damages since there was no permanent residual disability.[16]

An eleven-year-old, fifth grader suffered severe dental injuries when struck in the mouth by a hockey stick. The injury occurred in an after-school intramural floor hockey program when the stick blade of another player hit him on the follow-through of a shot. The Superior Court of Pennsylvania affirmed the trial court verdict of negligence against the Philadelphia Board of Education.[17] The coach of the program had sought safety equipment from the board but had not received it. And although no regulations required mouth guards for participants in amateur ice or floor hockey, there was sufficient danger involved in participating for the board to take responsibility for it.

5.1a(2) En Route to and from School

Schools have some responsibility for the safe movement of students to and from school. The precise extent of this responsibility depends on whether busing is involved and the nature of the risk in coming to school. Two cases were decided in this area last year.

The usual rule is that school districts are not legally responsible for accidents that students may suffer once they have been released from school or before they arrive at school. But in a recent California case a twelve-year-old was asked to stay after school to help her teacher grade papers. By the time the student left school the street crossing guards were off duty, and the girl was injured by a car while trying to cross the

15. Ehlinger v. Board of Educ., 465 N.Y.S.2d 378 (N.Y. App. Div. 1983).
16. Carson v. Orleans Parish School Bd., 432 So. 2d 956 (La. Ct. App. 1983).
17. Berman v. Philadelphia Bd. of Educ., 456 A.2d 545 (Pa. Super. Ct. 1983).

busy, unguarded street. The court of appeal refused to dismiss the action against the district holding that there was sufficient causation between the action of the teacher and subsequent injury of the child off the school premises to go to the jury.[18]

A nine-year-old girl was injured while crossing an intersection one-half block from school while on her way to school. Her father sued the crossing guard for alleged negligence for not assisting his daughter at the crossing. Since the injury occurred prior to 7:30 A.M., the time the crossing guard was scheduled to begin working the intersection, the trial court ordered a summary judgment for the defendant on the grounds that there was no duty on the part of the guard to act toward the child in any particular way prior to 7:30 A.M. Pursuant to the trial plaintiff got testimony from the principal that the crossing guard was on duty prior to 7:30. For this reason the court of appeal reversed the summary judgment, thereby allowing the matter to proceed to trial and consideration of the factual dispute so as to determine the level of the duty of care involved.[19]

5.1a(3) School Buildings and Grounds

There is a duty owing to the children regarding the safety of the buildings and the grounds. Two cases were reported in this area during 1983.

A six-year-old was injured at a construction site next to an elementary school where remodeling was being done. Where the school officials knew of the potential dangers at the construction site (in fact school officials reminded the students daily to stay away from the site) and provided no supervision, the District of Columbia Court of Appeals affirmed the trial court's finding of negligent supervision.[20]

In a New York case snowmobilers had collided with a snow-covered bench at night on a snow-covered baseball field on school district grounds. The appellate court ordered a summary judgment for defendant school district because there was no disputable fact that could show that the bench became a dangerous instrumentality that the school district maliciously failed to guard or warn against.[21]

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18. Perna v. Conejo Valley Unified School Dist., 192 Cal. Rptr. 10 (Cal. Ct. App. 1983).
19. Scott v. Farrar, 188 Cal. Rptr. 823 (Cal. Ct. App. 1983).
20. District of Columbia v. Royal, 465 A.2d 367 (D.C. 1983).
21. Mattison v. Hudson Falls Cent. School Dist., 458 N.Y.S.2d 728 (N.Y. App. Div. 1983).

5.1b Nonstudent Injuries

School districts have a duty of reasonable care to teachers and other adults and there were two cases reported in this area.

The Utah Supreme Court reversed the trial court that had dismissed a complaint for injuries suffered by a woman who slipped and fell on an icy sidewalk leading to the side entrance of the school. The supreme court held that the school district has a duty to maintain their buildings and grounds in a reasonably safe condition and to remove dangers.[22] Therefore the plaintiff is entitled to a trial on the issue of the school district's negligence in failing to maintain in a safe condition the sidewalk leading to the building.

An action against two students, who had allegedly dared, and thereby encouraged, others who knocked a waste basket off the landing injuring a teacher standing below, was dismissed because there was insufficient testimony to establish specific wrongdoing.[23]

5.2 NEGLIGENCE DEFENSES

Even if the injured plaintiff can satisfy the prima facie case, the defendant teacher or school district or administrator still has a number of defenses available to overcome the claim. These defenses range from immunity—either common law sovereign immunity or statutory immunity—to the more usual affirmative defenses to the introduction of a different standard of liability. The reader should be alert to the divergent motivations underlying these defenses. Immunity, for example, limits the flow of public money to private citizens because liability payments will detract from the educational functions of the schools, whereas the affirmative defenses keep the plaintiffs from recovering for behavior that in some way was responsible for the injury that occurred.

5.2a Immunity

5.2a(1) Common Law (Governmental) Immunity

A quarter of a century ago, tort liability in public schools was almost nonexistent because of sovereign immunity enjoyed by the state. Sovereign immunity has eroded to a great extent—though it still exists in several states. In many states the courts have abolished sovereign immunity or the legislatures have abolished it or passed some substitute form of statutory immunity. Ohio joined this group of states abolishing sovereign immunity.

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22. Gurule v. Salt Lake City Bd. of Educ., 661 P.2d 957 (Utah 1983).
23. Kline v. Ball, 452 A.2d 727 (Pa. Super. Ct. 1982).

The Supreme Court of Ohio held that the defense of sovereign immunity is not available to a board of education in an action seeking damages for injuries allegedly caused by the negligence of the board's employees.[24] This is the latest of a line of cases abrogating the doctrine of governmental immunity.

In a Florida case a father brought a suit against the school board seeking damages for the death of his eleven-year-old child who was struck by an automobile while en route to catch a school bus at an allegedly negligently located bus stop. The Florida Supreme Court, affirming the appellate court decision, held that the designation of school bus stops is a planning level decision that is immune from tort liability under the doctrine of sovereign immunity and that the amended complaint failed to allege sufficiently the existence of a known trap or dangerous condition that would create an operational level duty to post warnings.[25]

5.2a(2) Statutory Immunity

There are a variety of ways in which a statute can limit liability of a school district. One is to put a monetary limit on the maximum claim that a successful plaintiff can recover. Another way is to provide governmental immunity generally with specific statutory exceptions allowed. This is an area where there is a large amount of litigation because of cases testing the limits of the statute or its exceptions.

The South Dakota Supreme Court held that, consistent with a 1981 decision that refused to judically abolish sovereign immunity,[26] in the absence of a statute waving sovereign immunity from tort liability, the statute authorizing a school district to sue and be sued did not create a cause of action in tort.[27]

The Missouri Supreme Court decided a case alleging that a school district waived its claim to sovereign immunity by carrying liability insurance that would have covered the injuries that occurred on the bus. But the court refused to do this, holding that sovereign immunity is to be interpreted broadly with few execptions.[28] Since this insurance coverage is not one of the exceptions provided in the statute it is not available.

The North Carolina Court of Appeals held that a school board was statutorily immune from liability for injuries sustained by a minor as a

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24. Carbone v. Overfield, 451 N.E.2d 1229 (Ohio 1983).
25. Harrison v. Escambia Cty. School Bd., 434 A.2d 316 (Fla. 1983).
26. Merrill v. Birhanzel, 310 N.W.2d 522 (S.D. 1981); *see* THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 196.
27. Guillaume v. Staum, 328 N.W.2d 259 (S.D. 1982).
28. Bartley v. Special School Dist. of St. Louis Cty., 649 S.W.2d 864 (Mo. 1983) (en banc).

result of a fall from gymnasium bleachers to the floor in a gymnasium leased to the city.[29]

The Chicago Board of Education was sued when a child was injured as a result of a fall from a swing on the school playground. The case was dismissed because the plaintiff had not alleged willful and wanton misconduct as required pursuant to section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act.[30]

In this case the Illinois Appellate Court rejected attractive nuisance as a theory for imposing liability upon a school district for the injury of a student on the school playground.[31] The doctrine of attractive nuisance was inapplicable and did not negate the immunity available to the district under state statute.

The doctrine of attractive nuisance recognizes an exception to the general rule that an owner or occupier of land is under no duty to keep the premises in any particular condition to promote the safety of persons who come onto the land uninvited. The exception occurs where a child, whose presence on the land is foreseeable, is injured due to a condition on the property that is hazardous by reason of the child's inability to appreciate the risk involved. The attraction element is no longer significant except as to the extent that it indicates whether the landowner should have anticipated the presence of children on the premises.

A sixteen-year-old high school junior gymnast suffered paralysis from spinal injuries sustained from an incorrect dismount from the rings during a late afternoon practice session of the gymnastics team. The coach and the board of education were sued on both the theories of negligence (negligently failing to properly supervise and negligently failing to ensure proper use of safe equipment) and willful and wanton misconduct. A third charge was made only against the board in that it had negligently failed to supply the gym with adequate safety equipment. The trial court dismissed the negligent supervision claim, and the jury found for the coach and school district on the other two claims. The Illinois Appellate Court affirmed the trial court.[32] Statutory immunity covers injuries such as these that occur in extracurricular athletic programs. Speculation about use of additional matting and its part in possibly avoiding the injury was insufficient to overturn the jury decision that the conduct of the board was not willful and wanton by providing unsafe equipment. Under previous Illinois case law this statutory immunity protects teachers from liability for student injuries

29. Plemmons v. City of Gastonia, 302 S.E.2d 905 (N.C. Ct. App. 1983).
30. ILL. REV. STAT., ch. 85:3-106 (1979).
31. Jackson v. Board of Educ. of City of Chicago, 441 N.E.2d 120 (Ill. App. Ct. 1982).
32. Montag v. Board of Educ., 446 N.E.2d 299 (Ill. App. Ct. 1983).

unless willful and wanton misconduct is shown.[33] Where equipment is involved, the school district is responsible for providing safe, usable equipment.

The New York appellate court rejected the contention that sovereign immunity protected the school district and the municipality from any liability when a voter fell and injured herself after leaving the elementary school where she had gone to vote in a general election.[34]

A woman attended a chili supper on school property and was injured when she tripped on a metal grate on school property. The subsequent suit against the district for negligence in not having proper lighting was not barred by statutory exemption from limited liability imposed by tort claims act, which provides that a political subdivision or an employee of a political subdivision who enters upon any property on or under express or implied authority of law shall not be liable if a loss results from such entry.[35]

The uncertainty over the precise scope of Michigan's sovereign immunity defense in the public school context continues. In one recent case the parents of child diagnosed and treated for two years as suffering from a "delayed articulation" problem, but who was in fact suffering from a "language impairment," sued the district and the teacher for this misdiagnosis. The Michigan Court of Appeals held that both the school district and the teachers were immune from liability.[36] The school district was engaged in a governmental function. In addition, the speech therapy program was a governmental function, and the teachers acting in the program were operating within the scope of their duty and were also covered by this governmental immunity.

In a second case a high school student suffered an eye injury at the site of a house construction project as part of a building trades class. He was barred from bringing an action against the school district or teachers because of governmental immunity. The Michigan Court of Appeals affirmed this holding that the operator of a building trades class as part of a high school curriculum was a governmental function that entitled the school district to governmental immunity.[37] The court also held that the shops trade supervisor and the building trades class

33. *See* Kain v. Rockridge Commun. Unit School Dist. No. 300, 453 N.E.2d 118 (Ill. App. Ct. 1983) (school district and coach immune under state statute from alleged negligence in allowing student to play in a football game, in which he was injured, even though he had not participated in the minimum number of practice sessions required by the high school association).
34. Pujolas v. Town of Tonawanda, 458 N.Y.S.2d 779 (N.Y. App. Div. 1983).
35. Smith v. Broken Arrow Pub. Schools, 665 P.2d 858 (Okla. Ct. App. 1983).
36. Brosnan v. Livonia Pub. Schools, 333 N.W.2d 288 (Mich. Ct. App. 1983).
37. Regulshi v. Murphy, 328 N.W.2d 528 (Mich. Ct. App. 1982).

teacher were also engaged in a governmental function and, therefore, also enjoyed the same governmental immunity.[38]

The Commonwealth Court of Pennsylvania dismissed a complaint against a school district where a minor was assaulted late at night while walking on a sidewalk adjacent to school and forcibly taken through an unsecured gate in the fence around the school to an unlighted area of school grounds where she was beaten. The school district was immune from liability, and the facts do not come within the exception for negligence in the maintenance and control of school property.[39] Violent criminal acts as occurred here are not a reasonably foreseeable use of school property such that the exception will be applied.[40]

Because of statutory immunity barring any negligence claim the father of a boy hit by a baseball bat by another student during recess brought action against the board of education under a contract theory. In a per curiam decision the Alabama Supreme Court held that the board of education was not under an express or implied contractual obligation to maintain a safe atmosphere for students under the supervision during school hours.[41]

5.2b Other Defenses

5.2b(1) Contributory Negligence

In the case where the eleven-year-old was injured in the floor hockey program the school board alleged contributory negligence and assumption of risk on the part of the student. For minors between the ages of seven and fourteen Pennsylvania has a rebuttable presumption that the minor is incapable of contributory negligence. A rebuttal of the presumption must review the conduct in light of the behavior of a child of similar age, intelligence, or experience. The appellate court

38. *See also* Grames v. King, 332 N.W.2d 615 (Mich. Ct. App. 1983) (school district and employees protected by governmental immunity in suit that arose in injury from an assault in a locker room following girls' basketball game because the planning and carrying out of the girls' basketball program was a governmental function); and Boulet v. Brunswick Corp., 336 N.W.2d 904 (Mich. Ct. App. 1983) (summary judgment for football coaches because of statutory governmental immunity they enjoy so long as they perform their duties within the scope of their employment).

39. Vann v. Board of Educ., 464 A.2d 684 (Pa. Commw. Ct. 1983).

40. *See also* Auerbach v. Council Rock School Dist., 459 A.2d 1376 (Pa. Commw. Ct. 1983) (action against school district for improper supervision dismissed because of statutory immunity enjoyed by the school district); and Lewis v. Hatboro-Horsham School Dist., 465 A.2d 1090 (Pa. Commw. Ct. 1983) (summary judgment awarded for coach and district dismissing negligence because no exception of the statutory immunity applied where cause of the eye injury was not negligence in care, custody, and control of the district's baseball field, but was action of baseball coach in hitting line drive while player was rounding the bases).

41. Brown v. Calhoun Cty. Bd. of Educ., 432 So. 2d 1230 (Ala. 1983).

could not find any superior intelligence or experience to overcome this presumption.[42]

Unlike New York courts, where assumption of risk and contributory negligence affirmative defenses have been eliminated by the comparative negligence standard, the Pennsylvania courts continue to consider assumption of risk and contributory negligence as separate defenses. Still, the appellate court did not find sufficient evidence to support the trial court conclusion that the eleven-year-old boy's participation in the game amounted to an assumption of risk for this particular type of severe dental injury.

The Tennessee Supreme Court affirmed the decision of the court of appeals that the negligence of a twelve-year-old student in leaning out of a window on the right-hand side of a school bus as it moved forward was a proximate rather than a remote cause of fatal injury to the student.[43] The student was struck in the head by a guy wire supporting a utility pole. The conclusion that this action by a twelve-year-old was the proximate cause of the injury was supported by a preponderance of evidence indicating that the student was bright, alert, and intelligent, and that the student had been repeatedly instructed by monitors against placing his hands or other parts of his body outside windows of the bus when the vehicle was in motion. This finding acts as a total bar to recovery, whereas a finding of remote contributory negligence would have allowed some allocation of damages between the parties.

A school bus stalled on the way to school. A nine-year-old and a ten-year-old left the bus to call the school and inform it of the difficulties. They successfully crossed the four lanes of the highway to get to the phone, but upon returning to the bus the nine-year-old got separated from the older child at the median. As she stepped off the median the child was struck by an oncoming car that was not being negligently driven. The trial court dismissed the action against the school and bus driver. The appellate court reversed, holding that the nine-year-old was not contributorily negligent as a matter of law and that there was sufficient evidence to go to the jury on the question of proximate cause of the bus driver's negligence in allowing the child to cross the dangerous highway.[44]

On the contributory negligence claim North Carolina law has a rebuttable presumption that a nine-year-old child is incapable of contributory negligence. This is an issue of fact to be determined at trial. The appellate court was also persuaded that there were sufficient facts to go to the jury on the questions of whether the school and bus driver

42. Berman v. Philadelphia Bd. of Educ., 456 A.2d 545 (Pa. Super. Ct. 1983).
43. Arnold v. Hayslett, 655 S.W.2d 941 (Tenn. 1983).
44. Sharpe v. Quality Educ., 296 S.E.2d 661 (N.C. Ct. App. 1982).

had breached a duty to this minor bus rider and whether the bus driver's negligence was a proximate cause of plaintiff's injuries.

5.2b(2) Statute of Limitations

Some states limit claims against school districts by placing a more restrictive statute of limitations on the initiation of a suit.

In an action by an injured football player against the state athletic association for negligence in not recommending preseason football contact safety recommendations to member schools, which was filed after the statute of limitations had expired, the Oregon Court of Appeals affirmed the trial court in holding that the statute was tolled.[45] There were factors concerning the role of the state athletic association, particularly its part in failing to recommend policies supported by the national advisory body, which could not have been discovered earlier. Therefore, the statute was tolled and the action against the athletic association was timely.[46]

5.2b(3) Notice of Claim

In a New York case an appeal of a summary judgment dismissing actions was denied. Plaintiffs did not qualify for serving a late notice of claim. General knowledge of the accident and receipt of statements for certain medical and dental expenses within ninety days from date of accident did not satisfy requirement of a written notice of a trial claim.[47]

5.2b(4) Comparative Negligence

The comparative negligence doctrine is becoming increasingly important. Yet in one recent case in Maryland the court refused to substitute comparative negligence for contributory negligence. In cases from Rhode Island and Kansas the state supreme courts had to determine the applicability of comparative negligence doctrine to some unusual circumstances.

A fourteen-year-old student injured while attempting a front forward flip sought to have the common law doctrine of contributory

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45. Peterson v. Multnomah Cty. School Dist. No. 1, 668 P.2d 385 (Or. Ct. App. 1983).

46. *See also* Cinnaminson Twp. Bd. of Educ. v. United States Gypsum, 552 F. Supp. 855 (D.N.J. 1982) (federal district court refused to allow a summary judgment for denial of a tort claim based on strict liability tort theory, although it did bar warranty claims because they were filed outside of the four years defined as the outer limit in the statute).

47. Briganti v. Harrison Cent. School Dist., 457 N.Y.S.2d 89 (N.Y. App. Div. 1982). *See also* Nicholson v. Board of Educ., 339 N.W.2d 482 (Mich. Ct. App. 1983) (workers compensation claim barred when filed more than five-and-one-half years after stroke although the board had simple knowledge of employee stroke).

negligence judicially abrogated and the doctrine of comparative negligence adopted in its place in negligence actions in Maryland.[48] In a scholarly opinion tracing the history of contributory and comparative negligence and charting the increasing popularity of comparative negligence the Maryland Court of Appeals concluded that it was not willing to make the switch by judicial decree but would defer to the legislature.

On appeal of a judgment in excess of $2 million for the serious injury of a football player, the Rhode Island Supreme Court reviewed the decision and affirmed the award. The jury had initially awarded $3.5 million in damages but this was reduced to $2.1 million by the finding of 40 percent comparative negligence of the plaintiff football player and 60 percent negligence of the helmet manufacturer. The plaintiff appealed the application of this comparative negligence standard to reduce damages based on strict liability and breach of implied warranty. After a careful analysis of the statute and consideration of the distinguishing principles of negligence, strict liability, and implied warranty, the Rhode Island Supreme Court held that comparative negligence applies to all these causes of action.[49]

A school district brought an action against a roofing manufacturer for damages from a leaking roof, and the roofing manufacturer joined the architects, roofing contractors, and manufacturer of insulating material on which roofs were placed as third-party defendants. The Kansas Supreme Court affirmed the dismissal of the third-party defendants.[50] The decision distinguished between actions emanating in contract and torts. The concept of joint and several liability between tortfeasors has been replaced in Kansas by comparative negligence. Where comparative negligence is in issue the court deals in percentages of causal responsibility, expressed in degrees of comparative fault or causation by percentage. But comparative negligence is not applicable to contract law where, under a breach of warranty theory, the injury is simple economic loss. Comparative negligence is not applicable as basis for bringing third-party defendants into this action. The roofing manufacturer entered into a guarantee contract with the district to which the third-party defendants are not parties. Therefore, since there is no tort or contractual claim by which to bring these third-parties into the action they are dismissed. If the general roofing manufacturer is liable to the district it then has a right of subrogation in a separate action against those whose fault actually caused the damage to occur to the roofs.

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48. Harrison v. Montgomery Cty. Bd. of Educ., 456 A.2d 894 (Md. 1983).
49. Fiske v. MacGregor, Div. of Brunswick, 464 A.2d 719 (R.I. 1983).
50. Haysville Unified School Dist. No. 261 v. GAF Corp., 666 P.2d 192 (Kan. 1983).

5.3 LIABILITY INSURANCE

The basketball coach who was driving a van of players after a basketball game got into an accident. The van belonged to the principal of the school who had given express authority for it being used to transport players to the game. The insurer of the van settled with the injured students and sought contribution from the school district's insurer. The Alaska Supreme Court held that no contribution was required because the coach was not covered under the policy that the school district carried.[51] The van was not "owned" by the school district nor was it a "hired automobile" under the terms and definitions of the policy.

The insurer of the school district filed an action for contribution against the teacher's insurer. The Oregon Court of Appeals dismissed the action.[52] The court held that the school district's insurer could not claim contribution from the teacher's insurer since the teacher was not responsible to pay damages for his negligence so long as he was acting within the scope of his employment and therefore no obligation could arise in favor of the school district because of its having paid a settlement to student injured because of the teacher's negligence under statute mandating that district must indemnify the teacher.

The existence of insurance which, by its terms, does not cover punitive damages will act to waive immunity only as to claims for compensatory damages. In an Illinois case the action for punitive damages was dismissed, while the action for compensatory damages was remanded to the trial court for consideration on its merits.[53]

General allegations of negligence in complaint against employer were sufficient to involve insurer's obligation to defend action seeking damages for death of employee. Yet the insurer had no obligation to defend the school district in two actions for which there was no explanation of the legal theory upon which sums were sought. To the degree an inference was possible, damages sounded in contract, which the policy specifically excluded.[54]

Where there are two fires at two different places with two separate causal factors, there are two "loss occurrences," and whether they were set by one individual or different individuals or groups of individuals

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51. Insurance Co. of North America v. State Farm Mutual Auto. Ins. Co., 663 P.2d 953 (Alaska 1983).
52. United Pacific/Reliance Ins. Co. v. Horace Mann Ins. Co., 670 P.2d 172 (Or. Ct. App. 1983).
53. Collins v. School Dist. No. 189, 450 N.E.2d 387 (Ill. App. Ct. 1983).
54. Bryam Hills Cent. School Dist. v. State Ins. Fund, 476 N.Y.S.2d 690 (N.Y. App. Div. 1983).

was of no consequence. The deductible applies, therefore, to each occurrence.[55]

The Eleventh Circuit Court of Appeals affirmed summary judgment dismissing action against insurer seeking payment of full cost of attorney's fees incurred by policy-carrying principal who had been a defendant in a civil rights action because the $1,000 exclusionary limit in the policy was clearly stated and fit the facts of the case.[56]

5.4 EMPLOYEE INJURIES/WORKERS' COMPENSATION

Most negligence claims or injuries are brought by students, but it is possible for teachers or administrators to be injured and bring a negligence action against the district. But there is an alternative, workers' compensation, which is available in most states, that provides an alternative remedy for employee injury that occurs as part of employment and does not require a showing of fault on the part of the district. Several cases were reported in this area in 1983 and they provide insight into the boundaries of the worker's compensation claim.

A substitute teacher, on a November day, was accosted on her way home. She was knocked to the ground in a scuffle for her purse, and she suffered leg and back injuries and also bumped her head on the sidewalk. In March of the following year the substitute had an infection that caused deafness in one ear. The Illinois Supreme Court affirmed an arbitrator's decision, subsequently upheld by the industrial commission and the circuit court, that the teacher did not qualify for workmen's compensation because she did not prove that her injury arose out of and in the course of her employment.[57] The physical assault in November took place outside of school, and it was not demonstrated that this was linked to the ear infection. Evidence suggested that the hearing loss was due to a virus, and there was no indication that she contracted the illness from a child with a contagious disease. Nor did the eivdence prove that her apparent infection resulted from overheating or unsanitary conditions at the schools in which she taught.

The Illinois Supreme Court affirmed a decision of the industrial commission in which the Board of Education of the City of Chicago challenged is liability for payment of workmen's compensation in bad faith. The board of education could not satisfy the standard of objective

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55. Goose Creek Consol. I.S.D. v. Continental Cas. Co., 658 S.W.2d 338 (Tex. Civ. App. 1983).
56. Smith v. Horace Mann Ins. Co., 713 F.2d 674 (11th Cir. 1983).
57. Rosenbaum v. Industrial Comm'n, 444 N.E.2d 122 (Ill. 1982).

reasonableness in challenging the award. Attorney fees and penalties for the bad faith and vexatious delay were also upheld.[58]

> [W]hen the employer's refusal to pay benefits is founded on a challenge to liability that is not in good faith, allowing him freedom from an award of attorney fees might encourage him to delay matters indefinitely in the Industrial Commission and the courts until the claimant decides it would be easier to settle for a small part of what is legally his due than to spend the time and money that would be required to stick it out to the end. The overriding purpose of the Act, especially as expressed through its penalty sections, is to compensate claimants as early and as thoroughly as possible for income lost due to job-related injuries.[59]

A Louisiana appellate court affirmed a trial court decision awarding a school janitor total and permanent disability for back injuries suffered as a result of lifting garbage cans.[60] The injury occurred in the course of the janitor's employment, and it was immaterial that the diseased or weakened condition of the janitor's back might eventually have produced disability outside the employment situation. The court of appeal reversed the statutory penal penalty levied against the school district. This was reversed because the court of appeal found there was supporting facts for a good faith defense against the workmen's compensation claim. The janitor had not filed an accident report, and he had not complained of the pain being work related when he told the district administrator.[61]

A Louisiana trial court awarded workmen's compensation benefits for a sixty-three-year-old, overweight teacher who suffered back injuries when she was run over by several students in the school gymnasium. The school district argued that the teacher's long-term back and neck pain did not arise from the injury, but rather resulted from her age, obesity, and preexisting arthritis. The Louisiana appellate court affirmed the trial court, articulating the standard that a person can be compensated even if there is a preexisting condition so long as a work-related accident causes the disability even though the accident would not have resulted in a disability in a person without the condition.[62]

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58. Board of Educ. of City of Chicago v. Industrial Comm'n, 442 N.E.2d 861 (Ill. 1982).

59. *Id.* at 867.

60. Robichaux v. Terrebonne Parish School Bd., 426 So. 2d 241 (La. Ct. App. 1983).

61. *See also* Celestin v. Fireman's Fund Ins. Co., 430 So. 2d 1263 (La. Ct. App. 1983). (Louisiana Court of Appeal affirmed trial court decision finding the claimed injuries to be work related and making an award for total and permanent disability.)

62. Martin v. Orleans Parish School Bd., 427 So. 2d 83 (La. Ct. App. 1983).

In a workman's compensation case the California Supreme Court annulled the decision of the workers' compensation appeals board and remanded the case.[63] A school teacher was assaulted in her car immediately after leaving the school parking lot to go home from work under circumstances in which the teacher's car was immobilized by departing school children who blocked traffic. Usually, the application of a rule that treats someone going and coming to work as not covered under workmen's compensation would have barred recovery. Yet where the employment creates a special risk that extends beyond the boundary of the employment premises, compensation is allowed if injury occurs within the zone of that risk. In this case such a special risk did exist because the flow of children impeded the teacher's departure from school, and thus she was still eligible for compensation for injuries resulting from this assault.

An assistant superintendent suffered a fatal heart attack during a presentation to the board of education about a controversial school consolidation proposal, and his widow sought workmen's compensation benefits. She alleged that his death was caused by unusual stress on the job the day of the heart attack, which included a visit by the fire marshall who cited the district for thirty-eight violations, an investigation of a minor bus accident, and the presentation to the board on the conterversial topic. The state industrial board denied the claim because it was not persuaded that unusual stress occurred, but rather emphasized the bad heart condition of assistant superintendent, his unpromising genetic history, and the bad health condition he was in. The Indiana Court of Appeals affirmed the denial of compensation because the industrial board decision was not contrary to the evidence.[64]

A teacher was an employee of a school district when she was injured attempting to intervene in a fight between students, and the teacher filed for and received workers' compensation benefits. She then sought recovery under school district policy, which provided that the district would reimburse the teachers for reasonable costs incurred as a result of assault sustained by the teacher in the course of employment. The Texas Court of Appeals remanded this claim for trial on the merits because it could not see how the worker's compensation award could be treated as the exclusive remedy.[65]

An employee who had been injured when a box of cans fell on her and injured her shoulder and back sought reimbursement of benefits after returning to work had not satisfactorily carried her burden of

63. Parks v. W.C.A.B., 660 P.2d 382 (Cal. 1983).

64. Holloway v. Madison-Grant United School Corp., 448 N.E.2d 27 (Ind. Ct. App. 1983).

65. Davis v. Houston Indep. School Dist., 654 S.W.2d 818 (Tex. Civ. App. 1983).

proof in establishing that she was presently disabled from performing her regular job as a result of a recurring work-related injury.[66] The Pennsylvania Commonwealth Court reversed the appeal board's decision granting this reinstatement of benefits. The testimony of the doctor at the hearing did not satisfy this burden.

A workmen's compensation claimant sought reimbursement for rehabilitation expenses incurred. The New Mexico Court of Appeal affirmed the dismissal of the claim because the worker failed to establish the need for rehabilitation as required by statute.[67]

A school district employee, a clerk-typist, en route by car from one district building to another, got lost, stopped to ask directions, and while stopped was assaulted. The thief reached in through an open window and ripped a gold necklace off her neck. Approximately an hour after the assault the employee died of a heart attack. A Florida District Court of Appeal held that the dead employee qualified for worker's compensation benefits.[68] An assault can constitute an accident within the meaning of the statute. And expert testimony established the causal connection between the accident and the heart attack. It is not required to be shown that the accident caused other physical injuries which, in turn, caused the heart attack. It is enough if there is competent substantial evidence to support the proposition that the heart attack is causally connected to the accident.

Compensation was denied to a district guidance counselor who was injured while on the way home from an evening football game for which he had been paid as a ticket seller. The circumstances did not satisfy the special errands or missions exception to the general rule that injuries that occur while going and coming from work are not compensable.[69]

A CETA worker fell from the roof of a school where he was working during the summer. The Ohio Supreme Court held that the employee had an employer-employee relationship with the school district and he was thus barred from bringing a negligence action against the school superintendent because of immunity from suit provided by workers' compensation statutes.[70]

5.5 ASSAULT AND BATTERY

Assault and battery are usually talked about together although they actually are two separate intentional torts. Battery is an intentional

66. Bentworth School Dist. v. Workmen's Compensation Appeal Bd., 459 A.2d 906 (Pa. Commw. Ct. 1983).
67. Garcia v. Albuquerque Pub. Schools, 663 P.2d 1198 (N.M. Ct. App. 1983).
68. Popiel v. Broward Cty. School Bd., 432 So. 2d 1374 (Fla. Dist. Ct. App. 1983).
69. Gray v. Dade Cty. School Bd., 433 So. 2d 1009 (Fla. Dist. Ct. App. 1983).
70. Vandriest v. Midlem, 425 N.E.2d 321 (Ohio 1983).

and unpermitted touching of another while assault is an act of putting another in fear of the touching.[71]

An Ohio Court of Appeals reversed the trial court conviction of an assistant superintendent for assault. The trial court made two errors. First, it placed the statutory authority allowing reasonable corporal punishment as an affirmative defense. The appellate court held that the state, to convict a teacher or administrator for assault, must prove not only the elements of assault contained in the statute but must also prove beyond a reasonable doubt that the corporal punishment inflicted upon the pupil was unreasonable and was not reasonably necessary to preserve discipline.[72] Second, the conviction of the school administrator for assault of the student was against the manifest weight of evidence.

5.6 DEFAMATION

Defamation is the general term that covers the specific torts of libel and slander; libel applies in general to the written word while slander applies generally to the spoken word. The torts cover words that, in the eyes of the community, invade the person's reputation and good name.[73]

The prima facie case of defamation consists of five elements: 1) defamatory words, 2) publication, 3) falsity, 4) malice, actual or implied, and 5) resulting injury.[74]

A superintendent brought a defamation action against a school board member for comments quoted in a newspaper article that allegedly accused the superintendent of committing a crime and thereby harming him in his profession. The pertinent quote in the article said, "whatever legal ramifications result from that investigation—which could range from the superintendent losing his certification to criminal penalties—is [sic] up to the state's attorney. I think that the public will demand changes once all the information is brought out by the state's attorney." The central issue in this decision was whether the innocent-construction rule could be applied to the board member's statement. Under the innocent-construction rule, if the statement can reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than plaintiff, then the

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71. *See* PROSSER, *supra* note 1, § 9, at 34-41.

72. State v. Hoover, 450 N.E.2d 710 (Ohio Ct. App. 1982).

73. *See* PROSSER, *supra* note 1, for a more detailed description.

74. For elaboration of the prima facie case in an educational context, *see* Schwartz, *Defamation: A Worry for All Seasons*, 10 WEST'S EDUC. L. REP. 905 (1983) and Thurston, Ory, Mayberry and Braskamp, *Legal and Professional Standards in Program Evaluation*, 6 EDUCATIONAL EVALUATION & POLICY ANALYSIS 15 (Spring 1984).

statement is not actionable as a matter of law. The Illinois Appellate Court held that the innocent-construction rule applied—the words could reasonably be interpreted as not accusing the superintendent of a crime and the statement could be read as not imputing any unfitness or lack of ability on the superintendent—and dismissed the complaint.[75]

Dissatisfied parents petitioned the board of education to dismiss a teacher they thought unfit, accusing the teacher of such improprieties as striking a student, insulting various parents, and threatening bodily harm to a female parent. This petition was also given to a newspaper reporter. In determining the potential liability of the parents for defaming the teacher, the court analyzed the applicability of an absolute or qualified privilege. Because of the importance of keeping lines of communication open between parents and the school, the court held that the petition to the board of education was absolutely privileged and, therefore, immune from suit. The court refused to rule on what level of privilege existed for making the petition available to the newspaper reporter since insufficient facts were available. The absolute privilege is lost if the petition was maliciously instituted. And the existence of a qualified privilege depends upon the making of a bona fide communication in which the makers have a legal, moral, or social duty to speak and the communication is made to a person having a corresponding interest or duty. There was insufficient factual evidence about the reporter's mutuality of interest in the subject matter of the petition.[76]

A former San Diego school board member brought defamation action against her successful challenger, certain of challenger's campaign workers, local newspapers, and reporters. Where, as in the case, the plaintiff is a public figure the plaintiff must show with clear and convincing evidence that defamation was done with actual malice. This requires showing the disseminator of the falsehood either knew it to be untrue or made the publication with reckless disregard for the truth. The appellate court affirmed the trial court in dismissing many of the causes of action and holding that no special damages—loss of income and employment benefits—were available as a remedy because of the elections defeat. The appellate court held that there were triable issues of fact that the charges of "blackmail" and other criminal conduct and breaches of trust provided bases for defamation because they could reasonably be read as charging a public official with a crime.[77] In addition, there were sufficient facts to warrant going to trial on the question

75. Cartwright v. Garrison, 447 N.E.2d 446 (Ill. App. Ct. 1983).
76. Weissman v. Mogol, 462 N.Y.S.2d 383 (N.Y. App. Div. 1983).
77. Fisher v. Larsen, 188 Cal. Rptr. 216 (Cal. Ct. App. 1982).

of actual malice. The appellate court also held that there were triable issues of fact on the statements that the previous school board member appeared at union rallies and supported union demands. This is potentially defamatory per se since the encouragement of an illegal strike would be improper from a board member. And again, there were sufficient facts to raise the possibility that these statements were reported with knowledge of falseness, and therefore that actual malice existed. A number of other claims were dismissed.

The Florida appellate court upheld an award of compensatory damages for a teacher against a parent who had made libelous statements about the teacher before the board of education. Although the parent enjoys a qualified privilege to make statements imputing inefficiency or lack of competency to a public school teacher when such statements are made within the established procedures of the public school system, the privilege is lost if the statements are untrue and made with actual malice. There was sufficient evidence to support the trial court finding that the statements were made with malice.[78]

A federal district court, faced with a pendent state libel claim, denied a motion to dismiss the defamation action.[79] The action was brought by a white principal of a largely black Chicago elementary school who claimed that ten members of the school advisory board harassed her, and that certain statements made to the Chicago Board of Education and elsewhere defamed her. The court, with little elaboration, held that the defendants neither enjoyed an absolute privilege because of the statements being made to the board of education nor a qualified privilege. The principal was not a public figure, and therefore the actual malice standard is not appropriate. The court concluded by saying that the allegations were sufficient to state a cause of action for libel per se because the allegedly defamatory remarks could be found at trial to be directed at her "inability to perform or want of integrity in the discharge of duties of office or employment."[80]

5.7 TORTIOUS INTERFERENCE WITH A CONTRACT

In the case where a white elementary principal claimed harassment by a group of black parents trying to force her from her principalship, the federal district court refused to dismiss an action by the principal for tortious interference of contract. The five elements of the tort of inducing breach of contract are 1) an existing contract between the

78. Nodar v. Galbreath, 429 So. 2d 715 (Fla. Dist. Ct. App. 1983).
79. Stevens v. Tillman, 568 F. Supp. 289 (E.D. Ill. 1983).
80. *Id.*

plaintiff and a third party, 2) defendant's knowledge of this contract, 3) an intentional unjustified inducement to breach the contract, 4) a subsequent breach by a third party, and 5) resulting damage to the plaintiff. The court was willing to view the principal's reassignment to another school following her medical leave of absence as satisfying the breach of contract element. This, combined with an interpretation of the pleadings in a light most favorable to the plaintiff, persuaded the court to deny the motion to dismiss the tortious interference of contract claim.[81]

5.8 PRODUCTS LIABILITY

A New Jersey board of education had constructed four school buildings between 1959 and 1964. Because acoustical plaster containing asbestos was used in the construction, and because asbestos was subsequently determined to pose health hazards, the board had to remove the ceiling plaster at a cost of about $1 million. The board sought to recover the cost of removal and replacement under theories of strict liability in tort, breach of warranty, and negligence. It also sought punitive damages. In this case the defendant, United States Gypsum Company, sought summary judgment dismissing all of the claims. The federal district court granted summary judgment only on the warranty claims, which were barred by the four-year statute of limitations. The district court held that the strict liability standards of product liability apply in New Jersey. Therefore, where, as here, the board of education had no knowledge of the potential dangers of asbestos in acoustical plaster used in the ceilings of the four schools, the manufacturer who put the asbestos in the market place and profited thereby is liable for the cost of damages. There is liability even though the manufacturer did not have any knowledge of the danger of its product. And the liability continues so long as the plaintiff acts with due diligence in prosecuting the action.

In addition, the federal district court refused to apply the New Jersey ten-year limitation statute arising out of defective design of improvements to realty where the asbestos was not designed specifically for use in the schools and the supplier was not an architect involved in construction nor a contractor participating in construction.

Finally, the court refused to bar punitive damages. Punitive damages are available in New Jersey in an economic loss products liability suit if the district can establish the requisite egregious conduct on the part of the defendant.[82]

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81. Catalano v. Pechous, 387 N.E.2d 714, 721 (Ill. App. Ct. 1978).
82. Cinnaminson Twp. Bd. of Educ. v. United States Gypsum Co., 552 F. Supp. 855 (D.N.J. 1982).

5.9 INVASION OF RIGHT TO PRIVACY

A story about drug use in the junior high school appeared in the local newspaper. Accompanying the story were several photographs describing "apparent drug transactions" between students, and although the photos were processed to make the student unrecognizable one student alleged that she was recognized by schoolmates, teachers, and parents. She filed suit claiming the photograph was used without her consent and that its use was an invasion of privacy, both because it placed her in a false light and because the photogrpahs conveyed an extraorindary commercial benefit to the publishers. The Oregon Court of Appeals affirmed the jury verdict dismissing the false light claim because testimony at trial that the girl was a drug user undermined the essential element of a false light invasion of privacy claim that the publicity that placed her in a false light was false. The court also affirmed the summary judgment dismissing the commercial benefit claim premised on Restatement (Second) of Torts section 652c (1976):

> One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

There was no evidence that the article, which otherwise discussed a timely subject of interest in the community, was intended to have an extraordinary commercial benefit to publishers.[83]

A sixteen-year-old with a history of psychological problems transferred from a school in one state to a school in another state. To transfer to the receiving school she needed records from the first school, and the parents signed a form authorizing release only of the academic records. The psychological records and complete history of the student were mistakenly fowarded; after the girl had some trouble relating to other students in the second school the parents brought a cause of action against the first school claiming invasion of privacy. This particular strand of invasion of privacy, sometimes known as the tortious disclosure of private facts, involves two critical elements. First, there must be a publicity of a highly objectionable kind given to some private information about the person. It is irrelevant that the information may be correct and thereby bar any action for defamation. Second, the matter made public must be objectionable and offensive to a reasonable person of ordinary sensibilities. In this case the Maryland Court of Appeals dismissed the invasion of privacy claim because it could find no reasonable publicity nor any thing that unreasonably

83. Martinez v. Democrat-Herald Publishing Co., 669 P.2d 818 (Or. Ct. App. 1983).

placed the transfer student in an unreasonable light to the public.[84] Evidence indicated that the records could be sent without any parental authority, and that the records were seen only by the principal and the chief guidance counselor of the second school. No evidence was offered that showed that unwarranted publicity was given to the information contained in the records.

5.10 CONSTITUTIONAL TORTS

In a number of decisions over the past several years the Supreme Court has refined the area of constitutional torts where individuals,[85] absent good faith immunity, and municipalities are liable for depriving persons of constitutional[86] or federal stautory[87] claims. Punitive damages are not available against a municipality[88] under 42 U.S.C. § 1983.[89] The United States Supreme Court held in *Smith v. Wade*[90] that punitive damages are available against individuals. The Supreme Court articulated the following standard.

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or interest, or when it involves reckless or callous indifference to the federally protected rights of others .... [T]his threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness.[91]

Litigation continues to be heavy in the constitutional tort area with considerable attention given to the boundaries of a section 1983 action.

A learning disabled child and the father sued a public school district and the state department of education under a number of theories for inappropriate placement of the child. The federal district court had to

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84. Klipa v. Board of Educ. of Anne Arundel Cty., 460 A.2d 601 (Md. 1983).

85. Wood v. Strickland, 420 U.S. 308 (1975). This good faith, qualified immunity was extended to the Commissioner of Education and other state officials in Board of Educ. v. Ambach, 458 N.Y.S.2d 680 (N.Y. App. Div. 1982).

86. Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). Owen v. City of Independence, 445 U.S. 622 (1980) extends this liability to municipalities and denies immunity to the governing body even if the action was taken in good faith.

87. Maine v. Thibotout, 448 U.S. 1 (1980).

88. City of Newport v. Fact Concerts, 101 S. Ct. 2748 (1981).

89. For a more detailed description of the development of the constitutional tort, *see* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele ed.) at 260-67, THE YEARBOOK OF SCHOOL LAW 1981 (P. Piele ed.) at 226-29, and THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele ed.) at 205-8. *See also* Valente, *Federal Tort Liability for Civil Rights Deprivations in Public Schools*, 5 WEST'S EDUC. L. REP. 701 (1982).

90. 103 S. Ct. 1625 (1983).

91. *Id.* at 1640.

decide, among other things, the appropriateness of using section 1983 as a basis for this type of claim. The court used the four factors described in *Pennhurst*[92] as a refinement of *Maine v. Thibotout*[93] in determining what federal statues are actionable under section 1983: whether a private cause of action is available; whether the statute on which suit is desired provides a detailed statutory and administrative and judicial scheme for its enforcement; whether the statute creates new rights; and whether the statute provides a damage remedy. Considering these factors the court concluded that plaintiffs may not bring an action under section 1983 to vindicate rights created by the Education for All Handicapped Children Act.[94] Yet, because the Rehabilitation Act does not have a detailed administrative scheme and because money damages are available the court concluded that the statute was not intended as the exclusive means of asserting and protecting rights secured by the act; therefore, suit may be brought to vindicate the rights established by the Rehabilitation Act under section 1983.[95]

In a decision with much less analysis a federal district court in Wisconsin held that section 1983 is available as a remedy for violations of those provisions of the Education Consolidation and Improvement Act of 1981 that are preconditions to federal funding of state migrant education programs.[96]

A Wisconsin state court of appeals dismissed a section 1983 claim against a school district for a secretary's failure to warn the principal about a phone call alerting them to a man lurking around the school who is believed to have subsequently strangled a second grader. This was held insufficient for a Civil Rights Act claim for two reasons: first, although the secretary's action could be described as state action, the action of the murderer was not state action; second, the availability of a common law negligence action to pursue a remedy means that due process is available, and therefore there is no violation of the fourteenth amendment.[97]

The Seventh Circuit Court of Appeals affirmed a district court decision that the nonrenewal of an athletic director's position after the first

92. Pennhurst State School & Hosp. v. Holderman, 451 U.S. 1 (1981).

93. 448 U.S. 1 (1980).

94. A number of federal district court and circuit court of appeals decisions have held that neither damages nor attorneys' fees are available pursuant to section 1983 for alleged violations of the Education for All Handicapped Children Act. *See, e.g.*, Doe v. Koger, 710 F.2d 1209 (7th Cir. 1983); Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348 (5th Cir. 1983); Smith v. Cumberland School Comm., 703 F.2d 4 (1st Cir. 1983); Calhoun v. Illinois State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982); Smrcka v. Ambach, 555 F. Supp. 1227 (E.D.N.Y. 1983).

95. Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361 (N.D. Mich. 1983).

96. Valdez v. Grover, 563 F. Supp. 129 (W.D. Wis. 1983).

97. Enright v. Board of School Dirs., 338 N.W.2d 114 (Wis. Ct. App. 1983).

year violated the athletic director's fourteenth amendment due process. Because there was an oral contract for two years of employment the nonrenewal amounted to a deprivation of property, and therefore the court held that the nonrenewal procedural safeguards to satisfy the fourteenth amendment due process requirements.[98] In a per curiam decision the Supreme Court affirmed this decision by an equally divided court.[99]

Beyond this there are two recent cases that suggest the difficulties courts are having in drawing distinctions between traditional torts and constitutional torts.

A high school student was injured in a shops accident when his hand was badly cut by a table saw that did not have a guard. Because the action was barred in traditional tort action in Texas by sovereign immunity, this action was filed in federal court under 42 U.S.C. § 1983. Responding to several motions for summary judgment by the school district and shops teacher to dismiss the case the federal district court held as follows: 1) a torts claim was a viable basis for a section 1983 action where, as here, no remedy exists in state law and where, following the criteria of *Parratt v. Taylor*,[100] there was state action, an injury involving a liberty right, and a deprivation; 2) the dismissal of the state negligence action because of immunity did not bar this federal action under res judicata because there is no compelling policy consideration such as promotion of judicial economy or risk of double recovery that is substantially violated; and 3) the eleventh amendment does not provide immunity to the school district since it acts only to bar those suits against bodies that are only an agency or arm of the state.[101] The federal district court did hold that the shop teacher was immune from liability for damages in his individual capacity.

In a second case a student alleged that she had been deprived of her fourteenth amendment substantive due process right to be free from physical intrusion upon her person when her teacher disciplined her by piercing her upper arm with a straight pin. The federal district court dismissed the action because the student had not sufficiently demonstrated in her pleadings that the use of the pin had been motivated tto deprive her of some independent constitutional right. Simply alleging deprivation of some right that inheres in "substantive due process' was insufficient.[102] The frustration Judge Warriner felt in

98. Board of Educ. v. Vail, 706 F.2d 1435 (7th Cir. 1983).
99. Board of Educ. v. Vail, 52 U.S.L.W. 4483 (April 23, 1984).
100. 451 U.S. 527 (1981).
101. Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974 (S.D. Texas 1983). For commentary about this case, *see* Fuels & Horner, *The Negligent Deprivation of Liberty Interests Under 42 U.S.C. Section 1983*, 14 WESTS EDUC. L. REP. 615 (1983).
102. Brooks v. School Bd. of City of Richmond, 569 F. Supp. 1534 (E.D. Va. 1983).

attempting to distinguish common law and constitutional torts merits a lengthy quote from the opinion.

> Absent some such dividing line between common law tort and constitutional tort, we are left to a two-step analysis that does little to divide one tort from the other. We determine whether, first, a State employee is the defendant and, say the cases, we can only determine shock, vel non, after a trial. Only after a trial in an assault and battery case can we determine whether we had jurisdiction to try the case. If we are not shocked we didn't have jurisdiction. That is a heck of a way to run a Constitution.
>
> The lines that must legitimately and constitutionally be drawn between constitutional torts and common law torts are complicated and entangled. Unless federal courts are to become a special tribunal for the trial of tort claims where the defendant is a State employee, there must be some simplification and disentanglement. Lawyers and judges should be able to spot the difference with some degree of confidence. There should be some order and sense in the law. In hopes that it makes sense we shall continue to follow our understanding of *Screws*[103] and demand that each such tort, before it becomes actionable under § 1983, be motivated by a further desire to deprive the plaintiff of independently protected rights.[104]

5.10a Student-Initiated Cases

Two federal district court decisions dismissed student rights claims under section 1983 because there were no constitutional violations.[105]

5.10b Employee-Initiated Cases

A former employee sued the superintendent and the board of education alleging that she had been dismissed as a public school cafeteria worker solely because her son attended a private academy rather than the local public school district. The Fifth Circuit Court of Appeals held that the woman's school selection decision was within the penumbra of familial privacy rights guaranteed by the Constitution. The matter was remanded to the district court to examine the facts in light of the

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103. Screws v. United States, 325 U.S. 91 (1944).
104. Brooks, *supra* note 102 at 1539.
105. Rhodus v. Dumiller, 552 F. Supp. 415 (M.D. La. 1982); Tarter v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983).

balance necessary between this parental right and the right of the state in promoting efficiency in its educational services. In addition, the district court must also determine whether the protected activity played a substantial part in the board's discharge decision.[106]

A coach brought a section 1983 action for punitive and compensatory damages for alleged violation of his first amendment free speech rights when he was relieved of his coaching duties as a disciplinary action based upon his writing and sending of a letter to the board of education. The superintendent countered that the discipline was meted out because of the violation of the district's "channels rules," which required district employees to channel their remarks to the board through the superintendent. The federal district court held that the letter to the board was constitutionally protected and left it for the jury at a subsequent trial to decide whether this letter was a substantial factor in the disciplinary action of removing him from coaching. Depending on the decision of the jury on the extent of this substantive first amendment matter the federal district court held that 1) the district is responsible for the actions of the suprintendent because he was acting pursuant to district policy; 2) the district is not entitled to immunity; and 3) because the "channel's rule" was an impermissible prior restraint on first amendment rights the superintendent does not enjoy good faith immunity if the jury finds that the letter to the board was a substantial factor in the coach's discipline. Finally, the district court held that the coach is entitled to prove injury to reputation and, therefore, recover compensable damages, damages for mental and emotional distress, and punitive damages.[107]

A teacher's claim that his dismissal was improperly motivated by race was not barred from consideration in federal court under section 1983 even though the teacher had prusued state law remedies and ultimately lost. There was no problem with the statute of limitations and the state decision by the state board of education did not have the effect of collateral estoppel on this action because of the questionable procedures used in the state board reversal of the original hearing examiner's decision.[108]

In a North Dakota case a federal district court refused to dismiss a section 1983 action brought by a dismissed superintendent on a due process claim.[109]

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106. Brantley v. Surles, 718 F.2d 1354 (5th Cir. 1983).
107. Anderson v. Central Point School Dist. No. 6, 554 F. Supp. 600 (D. Or. 1982).
108. Griffen v. Big Spring Indep. School Dist., 706 F.2d 645 (5th Cir. 1983).
109. Okeson v. Toiley School Dist. No. 25, 570 F. Supp. 408 (D.N.D. 1983).

A number of claims were dismissed for not having demonstrated a violation of a constitutional right.[110]

110. *See, e.g.*, White v. South Park Indep. School Dist., 693 F.2d 1163 (5th Cir. 1982) (teacher dismissal did not violate his free speech and due process rights); Gordon v. Warren Consol. Bd. of Educ., 706 F.2d 778 (6th Cir. 1983) (placement of undercover woman in several classes to observe illegal drug trafficking did not violate any substantive rights of teachers or students in classes she observed); Reichert v. Draud, 701 F.2d 1168 (6th Cir. 1983) (changing of teaching schedule did not violate teacher's first amendment rights); Renfroe v. Kirkpatrick, 549 F. Supp. 1368 (N.D. Ala. 1982) (alleged violation of free speech was actually done for legitimate employment reasons); Barry v. Blue Springs R-IX School Dist., 557 F. Supp. 249 (W.D. Mo. 1983) (termination of school district dietitian pursuant to bona fide financial crisis did not deprive her of constitutional due process); Bryant v. St. Helena Parish School Bd., 561 F. Supp. 239 (M.D. La. 1983) (no substantive violation of either free speech or due process in the teacher dismissal); New Castle Cty. Voc.-Tech. Educ. Ass'n v. Board of Educ., New Castle Cty. Voc.-Tech. School Dist., 569 F. Supp. 1482 (D. Del. 1983) (claims that board's failure to pay yearly salary step increases deprived teachers of first amendment freedom of association and fourteenth amendment due process rights were dismissed).